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No. 05-593

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In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." The petition presented the following two questions about the Act:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

In granting the petition, the Court directed the parties to brief and argue the following additional question:

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

As in petitioner's opening brief ("Pet. Br."), we address first the jurisdictional question posed by the Court, followed by the two merits questions presented by the petition.

I. The Court of Appeals Lacked Jurisdiction.

As an initial matter, the Government argues that the "district court's substitution ruling and its remand order are reviewable under the collateral order doctrine or by way of mandamus." Brief for Respondent Barry Haley ("Haley Br.") at 13 (section heading). Petitioner agrees that, *if* 28 U.S.C. § 1447(d) did not deprive the court of appeals of jurisdiction, then neither lack of finality nor the limitations of mandamus would stand in the way of appellate review. But as explained before, *see* Pet. Br. at 10-18, and as amplified below, the Sixth Circuit lacked jurisdiction under the plain terms of § 1447(d), which (when it applies) bars review "on appeal or otherwise."

1. The Government asserts that § 1447(d) does not apply here because "[o]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." Haley Br. at 17 (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995)). Having quoted very similar language in her own brief, petitioner agrees with this general point. *See* Pet. Br. at 10 ("the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c)" (quoting *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006))). Of course, petitioner has also explained at length why the remand order here was indeed based on one or both of the grounds specified in § 1447(c), namely, "lack of subject matter jurisdiction or a "defect other than lack of subject matter jurisdiction." To summarize:

- The district court issued its remand order on the belief that it "ha[d] no jurisdiction over this case"; similarly, the court of appeals understood that the district court had "conclud[ed] that it lacked jurisdiction." Pet. Br. at 11 (quoting Pet. App. 25a, 4a).
- The district court essentially concluded that removal was improper because the Attorney General "lacked authority" to remove the action to federal court based on an incident-denying certification, *id.* at 12, and "a finding that removal was improper [for lack of authority to remove] deprive[d] that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)," *id.* (quoting *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 87 (1991)).
- Alternatively, the district court's same "belief that the removal was 'not authorized by law'" made the court's remand order one based on a "defect" within the meaning of § 1447(c). *Id.* at 13 (quoting *Cook v. Wikler*, 320 F.3d 431, 439 (3d Cir. 2003)).

How does the Government respond to the foregoing explanation? Not by contradicting it, but rather by advancing the principle that § 1447(c) is "limited to remand orders for a lack of subject matter jurisdiction *at the time of removal*." Haley Br. at 18 (emphasis added). The Government then asserts (without any citation to the record) that the remand order here "was not based on a lack of subject matter jurisdiction at the time of removal, and so does not come within Section 1447(c)." *Id.* at 19. The record shows otherwise.

Although it did take some time (as all litigation takes time), the district court in the end concluded that the Attorney General had issued (and had predicated removal upon) a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place." Pet. App. 14a. The court also concluded that in issuing this incident-denying certification (and in removing the case on such basis), the Attorney General had attempted to do exactly what he was

not "permitt[ed]" to do, thereby obliging a remand for lack of jurisdiction. *Id.*; *see also* Pet. Br. at 6-7, 12-13. Neither the certification itself, nor any of the facts on which it was based or challenged, post-dated removal. In other words, all of the jurisdictional considerations on which the district court based its remand order were, to use the Government's term, "fixed" *at the time of removal*. Haley Br. at 18.

That leaves the Government's assertion that "[u]nder the express terms of Section 2679(d)(2), the Attorney General's certification conferred subject matter jurisdiction on the district court at the time of removal." Haley Br. at 19-20. On the merits, of course, that point is in dispute. *See* Pet. Br. at 34-41; *infra* pp. 18-19. But for present purposes, the crucial point is that § 1447(d) renders unreviewable the district court's contrary interpretation of § 2679(d)(2)—*even if that interpretation was wrong*. As the Court recently emphasized, where a district court remands a case based on a perceived lack of subject matter jurisdiction, appellate "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher*, 126 S. Ct. at 2154.

2. The Government next argues that § 2679(d)(2) is what the Court in *Kircher* called a "statutory exception" to the bar of § 1447(d). 126 S. Ct. at 2153. That is, because "Congress made clear that cases removed by the Attorney General under that mandatory provision of the Westfall Act are not subject to remand *at all*," Congress "could hardly have intended to render such an order, if nonetheless entered, unreviewable by virtue of Section 1447(d)." Haley Br. at 20. Both parts of this argument are wrong.

As for the premise, it is obvious that at least *some* actions removed by the Attorney General purportedly under the Westfall Act are subject to remand. Section 2679(d)(2) provides that upon a particular kind of certification, "any *civil* action or proceeding commenced upon such claim in a *State court* shall be removed without bond at any time *before* trial by the Attorney General" to federal district court (emphasis added). In the face of this language, can it really

be thought that a removed *criminal* proceeding is "not subject to remand *at all*"? What about an action removed from a *tribal* court or a state *administrative body*? Or an action removed *after* trial has commenced? Are these "not subject to remand *at all*"?

Obviously, all of these cases *are* "subject to remand." Therefore, the Westfall Act is actually a statute that allows removal (and forecloses remand) in some circumstances but precludes removal (and compels remand) in others. In this respect, of course, the Act is similar to every other removal statute. Determining in any given case whether the applicable removal statute forecloses or compels remand might pose a difficult question, but it is surely a question that district courts confront routinely. When those courts answer that question in favor of remand (as did the district court here), § 1447(d) insulates the answer from appellate review, even if (as reiterated above) the answer is "wrong."

As for the Government's conclusion, it does not follow even if the premise is granted. *Kircher* made it clear that an extrinsic exception to the bar of § 1447(d) cannot rest on so flimsy a construct as what Congress "could hardly have intended." Instead, any such exception must be grounded in a "'clear statutory command'" by which Congress can be said to have "expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand orders." 126 S. Ct. at 2153 n.8 (quoting *Things Remembered*, 515 U.S. at 128). Though we agree with the Government that Congress need not "cross-referenc[e]" § 1447(d) in explicit terms, Haley Br. at 20, the very statute cited by the Government as exemplary highlights that the Westfall Act lacks the "clear statutory command" necessary to except it from § 1447(d)'s purview. The cited statute authorizes the Resolution Trust Corporation to "appeal any order of remand entered by a United States district court." 12 U.S.C. § 1441a(*l*)(3)(C), *quoted in* Haley Br. at 20. The clear and express references to *appeal* and *remand* contrast starkly with the absence of such terms in § 2679(d)(2). As in *Kircher*, "that silence tells us we must

look to 28 U.S.C. § 1447(d) to determine the reviewability of remand orders under the Act." 126 S. Ct. at 2153 n.8.[1]

3. The Government then turns to *Kircher*, if only to try to distinguish the removal provision at issue there, 15 U.S.C. § 77p(c), from the one at issue here. *See* Haley Br. at 21-23. Assertedly, the teachings of *Kircher* have no applicability here because "[r]emoval under the Westfall Act is fundamentally different in two critical respects." *Id.* at 22.

First, the Government asserts that unlike the statute considered in *Kircher*, the Westfall Act "mandates a federal forum for determination of the critical scope-of-employment question on the merits of the case." *Id.* On the merits of *this* case, petitioner disputes that an incident-denying certification even raises a true scope-of-employment question. *See* Pet Br. at 24-26. For present purposes, the more important point is any judicial determination concerning the circumstances in which the Westfall Act mandates a federal forum is necessarily a *jurisdictional* determination under a federal removal statute. Again, when that determination yields a remand, it "is immunized from all forms of appellate review" by § 1447(d). *Kircher*, 126 S. Ct. at 2153.

Second, the Government observes that while removal jurisdiction in *Kircher* "depend[ed] entirely on the defendants having a successful defense," such jurisdiction under the Westfall Act is secured "even if the district court later overturns the scope-of-employment determination and resubstitutes the employee as defendant." Haley Br. at 22. But as explained above, the district court did not "overturn" the Attorney General's scope-of-employment determination in this case; rather, the court concluded—right or wrongly, it matters not for purposes of § 1447(d)—that in making an incident-denying certification, the Attorney General tried to

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[1] In this context, the Government relies on *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993). *See* Haley Br. at 20-21. We have already addressed why *Aliota* is not convincing on this point. *See* Pet. Br. 14-16.

do what the Westfall Act did not permit him to do. As for the Government's invocation of the federal officer removal statute, *see id.* at 23, we have already explained how that statute buttresses the district court's decision to remand. *See* Pet. Br. at 40-41; *see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 & n.1 (9th Cir. 2006) (applying the bar of § 1447(d) to a case removed under § 1442(a)(1)).

4. The Government next calls attention to the "consequences" and "ramifications" that would flow from a ruling by this Court that the district court's remand order is immunized from appellate review by § 1447(d). *See* Haley Br. at 22-23. They are basically two: (1) respondent Haley could not avail himself of the right conferred by *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), to an immediate appeal of the trial court's denial of his claim of official immunity; and (2) he would be compelled to defend against petitioner's state-law tort claims in state court, with federal-court consideration of his federal defenses confined to "review in this Court from an adverse state-court decision." *Id.* at 23. But these considerations are not sufficient to overcome the long-standing "policy of Congress [that] opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher*, 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).

First, as the Court made clear in *Johnson v. Fankell*, 520 U.S. 911, 916-17 (1997), "*Mitchell* was an application of the 'collateral order' doctrine," and it "construe[d] the federal statutory language of 28 U.S.C. § 1291." Thus, the "right to have the trial court rule on the merits of [an] immunity defense . . . has its source in [federal substantive law], but the right to immediate appellate review of that ruling in a federal case has its source in § 1291," making it a "federal procedural right." *Id.* at 921. As such, the right to immediate appellate review is quintessentially subject to limitation by Congress. Section 1447(d) is just such a limitation.

Moreover, while it is fair to call attention to "the Westfall Act's goal of shielding federal employees from . . . the threat of protracted personal tort litigation," Haley Br. at 24, *Johnson v. Fankell* has already rejected the contention that "officials' interest in avoiding the burdens of litigation" trumps all competing considerations. 520 U.S. at 922. One of those "countervailing considerations" that will overcome the right to immediate appeal is the "appropriate interpretation of § 1291" and the policies underlying its final judgment rule. *Id.* (discussing *Johnson v. Jones*, 515 U.S. 304 (1995)). There is no reason to believe that the appropriate interpretation of § 1447(d) and the policies underlying its similarly ancient bar of appellate review of remand orders are any less important. *Cf. Rice*, 327 U.S. at 749.

Second, the Court has also rejected the notion that the possibility of defendants' being "wrongly" forced to litigate in a state court, with federal review limited to the exercise of this Court's certiorari jurisdiction, is any cause to abandon the bar of § 1447(d). Thus, *Kircher* acknowledged that the hardship to the defendants resulting from the remands in that litigation was "made acute by our recent decision in *Dabit*, which expressly disavows the district court's limited view of the scope of" the governing substantive statute. 126 S. Ct. at 2156 (referring to *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503 (2006)). But that hardship, acute though it may have been, did not justify departing from § 1447(d), for the defendants were able to "argue the significance of *Dabit* and ask for dismissal on grounds of preclusion *when they return to the state court*," and "any claim of error on that point can be considered on review by this Court." *Id.* at 2156-57 (emphasis added). If hardship to defendants in general does not justify making an exception to § 1447(d), neither does hardship to *the Government* in particular. The Court put it this way in *Rice*:

> It may be arguable, as a matter of policy, that in giving the Government the right to intervene and remove a cause from a state court, it should also

> have been given the right, not allowed to private litigants, to have orders of remand reviewed in the appellate courts. But the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts, is as pertinent to those removed by the United States as by any other suitor . . . .

327 U.S. at 752.[2]

In sum, that a citizen of Kentucky should answer in a Kentucky court for actions concededly undertaken *outside* the scope of his federal employment (if they occurred at all) is hardly "problematic." Haley Br. at 24. It is instead the norm in "a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." *Johnson v. Fankell*, 520 U.S. at 922.

5. Finally, the Government invokes *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). *See* Haley Br. at 25-27. We have briefed this issue before, *see* Pet. Br. at 16-18, and will not labor it here. We would add only that the applicability of *Waco* turns, as so much in this case turns, on a correct understanding of the district court's

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[2] In this context, we are at loss to understand the Government's statement that, if the remand order were reinstated, the "United States would be forced to subject itself and its employees to the jurisdiction of the state courts and seek to vindicate the Attorney General's certification there." Haley Br. at 24. With respect to the United States as a party, it was not named as a defendant in petitioner's state-law complaint, and it did not otherwise appear in the state-court action. The whole point of petitioner's efforts in federal court has been to keep the United States *out of* the case.

With respect to the United States as a provider of legal representation to federal employees, Department of Justice regulations have long contemplated that in some circumstances, an employee "may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity." 28 C.F.R. § 50.15(a). These proceedings expressly include those in state courts. *See, e.g., id.* § 50.15(a)(7).

work. If, as the Government asserts, *see, e.g*, Haley Br. at 28 n.8, the district court merely undertook a conventional "review" of the Attorney General's certification of the kind at issue in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), then the court's order rejecting the certification and its order effecting remand can be "disaggregated," *Kircher*, 126 S. Ct. at 2156 n.13, and reviewed separately. But if, as petitioner has demonstrated, the district court rejected the incident-denying certification in this case because the court concluded (rightly or wrongly) that the Attorney General lacked authority issue it—that is, the certification was not "erroneous" but was instead unauthorized by the Westfall Act—the court's orders were "inextricably linked" to one another, *Aliota*, 984 F.2d at 1353, and *Waco* is inapplicable.

Accordingly, 28 U.S.C. § 1447(d) deprived the court of appeals of jurisdiction to review the district court's remand order, and the judgment of the court of appeals should be vacated for lack of jurisdiction.

II. The Attorney General Lacks Authority to Issue "Incident-Denying" Certifications.

The Government devotes Part II of its brief to arguing that "the Attorney General need not accept the truth of the plaintiff's allegations in making a scope-of-employment certification." Haley Br. at 28 (section heading). As a result, the Government's argument is focused almost exclusively on the *factfinding* authority of the Attorney General and of the district courts in Westfall Act cases. For example:

- "the Attorney General's scope-of-employment certification under the Westfall Act may . . . rest upon the resolution of disputed facts," *id.* at 28;
- "a federal employee is entitled to a federal forum . . . to resolve any disputed facts" regarding his claim of official immunity, *id.* at 29 (section heading);
- Haley is entitled "to a resolution by the district court of any disputed facts relating to his immunity defense," *id.* at 31;

- "nothing in th[e] language [of § 2679(d)] requires the Attorney General to accept the truth of the plaintiff's allegations regarding the 'incident' that gave rise to her claim or the federal official's connection with it," *id.* at 33;
- "the question whether the employee was acting within the scope of his employment can usually be made as a matter of law, but will occasionally require limited discovery and the determination of facts," *id.* at 35;
- "Haley was . . . entitled to a federal forum to determine the facts relating to his defense of federal officer immunity," *id.* at 39.

With all due respect to the Government, these contentions and their supporting argument have little connection with the question presented. That question is not whether the Attorney General or the district court can "resolve disputed facts" or whether a federal employee is "entitled to a federal forum" to determine his immunity defense. Rather, the question presented is

> Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

Supra p. i. As set out below, the Government's brief simply does not answer this question. By contrast, petitioner has demonstrated that the correct answer is "no."

1. The Government argues that Haley is entitled "to a resolution by the district court of any disputed facts *relating to his immunity defense*," *id.* at 31 (emphasis added), or to say the same thing, he is "entitled to a federal forum to determine the facts *relating to his defense of federal officer immunity*," *id.* at 39 (emphasis added). We generally agree with these principles, but the emphasized phrases are the key to understanding why incident-denying certifications are not encompassed by the identified entitlements.

As explained previously, *see generally* Pet. Br. at 23, the Westfall Act establishes a powerful yet limited immunity for federal employees sued in civil actions. That is, the Act grants "absolute immunity for Government employees . . . for torts committed by [them] *in the scope of their employment*"—and not otherwise. *United States v. Smith*, 499 U.S. 160, 163 (1991) (emphasis added); *accord* Haley Br. at 2 (observing that the Act "confers a statutory immunity on federal employees for acts *within the scope of their employment*" (emphasis added)). Indeed, this Court has observed that Congress "wanted the employee's personal immunity to turn on that question alone." *Lamagno*, 515 U.S. at 426.

These precepts mean that any "immunity defense" to be asserted by a federal employee under the Westfall Act is necessarily a defense that the employee was acting "within the scope of his employment." Not surprisingly, this is just what the Attorney General must certify in order properly to invoke the Westfall Act and remove a case to federal court: "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." § 2679(d)(2). By contrast, a defense of "I didn't do it" or "it never happened" is not an *immunity* defense, for it does not implicate *scope of employment*. *See* Pet. Br. at 29-30 (citing cases that illustrate the distinction between immunity and other kinds of legal defenses). Correspondingly, the Westfall Act does *not* authorize the Attorney General to certify "that the defendant employee did not participate in the incident out of which the claim arose" or to remove a case on that basis.

But "I didn't do it" or "it never happened" is precisely the defense that is invoked by an incident-denying certification. As the court of appeals perceived, such a certification "amounts to a denial that any wrongdoing occurred," Pet. App. 4a, and resolution of the defense is "accomplished by deciding whether the employee committed the wrong the plaintiff alleges," Pet. App. 5a. As illustrated by numerous cases, *see* Pet. Br. at 23-26, deciding "whether the alleged

harm-causing incident occurred *at all*," Pet. App. 3a-4a (emphasis added), is crucially different from deciding whether the incident occurred "*within* the scope of [an employee's] office or employment," § 2679(d)(2) (emphasis added).

In sum, the Westfall Act entitles a federal employee to a federal forum to determine his *immunity* defense (including factual questions pertinent thereto). But the Act does not entitle a federal employee to a federal forum to assert *every conceivable* defense, like a defense that "amounts to a denial that any wrongdoing occurred." Pet. App. 4a. When he purports (as in this case) to remove an action to federal court to litigate such a defense, the Attorney General oversteps the authority granted him by the Westfall Act.

2. *Willingham v. Morgan*, 395 U.S. 402 (1969), is not to the contrary. The first part of *Willingham* concerned the standards for removal pursuant to 28 U.S.C. § 1442(a)(1). The Court ruled that the statute "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. at 406-07. The point of the statute is "to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. This ruling accords perfectly with the analysis set forth above: removal is authorized where a defendant can raise not just *any* colorable defense but rather a colorable defense "arising out of [his] duty to enforce federal law."

The second part of *Willingham* concerned the standards for determining whether a lawsuit "grows out of conduct under color of office, and . . . is, therefore, removable." *Id.* Observing that its cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority," the Court ruled that the defendants "had demonstrated the required 'causal connection' " by virtue of "the undisputed fact that [they] were on duty, at their place of federal employment, at all the relevant times." *Id.* at 409. Finally — and here is where the Government repeatedly draws attention, *see* Haley Br. at 30, 32, 39, 41—the Court ruled:

> If the question raised is whether [the defendants] were engaged in some kind of "frolic of their own" in relation to [the plaintiff], then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish. [The defendants] sufficiently put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts.

395 U.S. at 409. The reasonable import of this passage is that *when* federal employees "sufficiently put in issue the [defenses] of official justification and immunity," they are entitled to determination of those defenses in federal court, and that determination may include a court's deciding between competing versions of the facts. This passage is not, however, warrant for some free-floating right on the part of federal employees to "tell their story" to a federal court, especially if that story is not about official immunity.

3. Much of the Government's argument is premised on the notion that this case does not, after all, involve an incident-denying certification and, concomitantly, that the case presents disputed issues of fact that truly bear on the scope of respondent Haley's federal employment. Instead of a binary choice between two versions of the facts—Haley "had nothing to do with petitioner['s] being fired" (his version), versus he did "bring about petitioner's firing through actions that were outside the scope of his employment" (her version)—the Government now proffers a third alternative: "Haley did have some connection to petitioner's dismissal, but his actions were intended to further the interests of the Forest Service . . . and were therefore within the scope of his employment." Haley Br. at 37. This Court should reject the Government's attempt to rewrite the record as understood by both courts below and to relitigate this case from scratch.

First, as to whether there is some undeveloped factual issue that could turn this into a true scope-of-employment

case, the district court understood the Government to argue that Haley had no "connection" whatsoever to petitioner's dismissal, given Haley's "declaration stating that he had no communication with [respondent Luber] regarding the decision to fire [petitioner]." Pet. App. 13a-14a.[3] Though the district court was willing to entertain alternative legal arguments, it reasonably refused to credit "factual arguments made in the alternative when one version is made under oath subject to perjury, *i.e.*, Mr. Haley's declaration, and the other version merely suggested." Pet. App. 14a. Haley was indeed allowed to "present [his] version of the facts to a federal . . . court." Haley Br. at 39 (quoting *Willingham*, 395 U.S. at 409). He and the Government now complain essentially that the court took that presentation too seriously.

In this light, the district court understood this case to involve a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place." Pet. App. 14a. Likewise, the court of appeals identified a circuit split in cases "where, *as here*, the Attorney General's scope certification amounts to a denial that any wrongdoing occurred." Pet. App. 4a (emphasis added); *accord* Pet. App. 3a (observing that the Government "denied . . . that Haley interfered with [petitioner's] continued employment."). This is, then, truly a case involving an incident-denying certification.

Second, as to whether it would "have been outside the scope of Haley's employment for him to influence petitioner's termination," Haley Br. at 38, petitioner did not dream up the Government's concession. Rather, the *Sixth Circuit* understood that the Government "*conceded* that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a (emphasis added). That understanding is supported by a statement in the Government's

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[3] The Government's attempt to disavow the categorical nature of Haley's declaration, *see* Haley Br. at 38-39 n.11, is not credible. That declaration, and Paragraph 6 in particular, speaks for itself. *See* J.A. 47-48.

appellate brief—"the Memorandum of Understanding [between the Forest Service and LBLA] only showed that, if Haley did cause [LBLA] to fire [petitioner], he acted outside the scope of his employment," Haley Br. at 37-38—and by the course of proceedings in the district court. That court ruled (expressly citing the Memorandum) that "any interaction Mr. Haley might have had regarding [petitioner's] employment was out of the scope of his duties with the Forest Service." Pet. App. 23a. In seeking reconsideration, the Government aggressively challenged other aspects of the district court's order, but its motion did not even mention the Memorandum of Understanding, let alone confront the court's ruling on its significance. *See* J.A. 40-50.

4. Finally, the Government contends that the construction of § 2679(d)(2) advanced by *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc), and adopted by petitioner would "allow plaintiffs to deny federal employees the benefits of the Westfall Act through artful pleading." Haley Br. at 39 (section heading). While the Government admits that the *Wood* supplies district courts with wide latitude to confront artful pleading by "resolv[ing] any . . . factual conflicts, relevant to immunity, prior to trial," *id.* at 40 (quoting *Wood*, 995 F.2d at 1129), it posits a "practical, as well as theoretical, difficulty in drawing the kind of distinctions between *characterization* of an incident and *denial* of an incident that the *Wood* majority envisioned," *id.*

The two cases cited by the Government belie its assertion of "difficulty." In *Kimbro v. Velten*, 30 F.3d 1501 1502 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995), a plaintiff alleged that a federal employee "viciously struck [her] on the right arm." The defendant did not need to "characterize" the incident; she simply denied it outright, submitting a "sworn declaration claiming that she did not recall ever touching" the plaintiff. In *Melo v. Hafer*, 13 F.3d 736, 741 (3d Cir. 1994), the question was whether the defendant federal employee "had turned over a list of suspected jobbuyers within the Auditor General's Office in order to assist

Barbara Hafer in her political campaign for Auditor General." Again, the employee did not need to "characterize" the incident; he too denied it outright, declaring under oath that "although he investigated plaintiffs in the course of his official duties, . . . he did not provide the information about the plaintiffs to Hafer before she was sworn in as Auditor General following her successful campaign." *Id.* at 740. In the present case, of course, the Sixth Circuit had no trouble perceiving that "the Attorney General's scope certification amounts to a *denial* that any wrongdoing occurred." Pet. App. 4a (emphasis added).

In any event, the conceivable difficulty in drawing distinctions under the *Wood* analysis is far outweighed by the concrete distortions that the Government's approach would introduce into federal tort litigation. As several courts of appeals have recognized, that approach expressly contemplates "inquiry into merits facts." *Melo*, 13 F.2d at 476. Indeed, it "requir[es] a decision on the merits of [a plaintiff's] claim." Pet. App. 3a; *see also Kimbro*, 30 F.3d at 1505, 1507 (recognizing that "the scope question and the merits often overlap—sometimes exactly"—such that "to resolve the disputed factual issue" is "really [to resolve] the whole case").

As a theoretical matter, none of this can be reconciled with the Court's repeated teaching that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Mitchell*, 472 U.S. at 525; *see also* Pet. Br. at 29-30 (citing other decisions to this effect). As a practical matter, moreover, the merits-encompassing judicial factfinding contemplated by the Government "impos[es] a major restraint upon the plaintiff's right to a jury trial," *Wood*, 995 F.2d at 1130—a restraint without warrant in the Act, *id.* at 1126.

But that restraint is only the start. The Government's approach realistically dictates, for potentially *every* state-law tort claim brought against a federal employee, litigation of the whole case on the merits under *sui generis* procedures not seen even in actions involving qualified immunity from constitutional torts. Thus, Third Circuit contemplated:

- some—but not too much—discovery for the plaintiff, who "should then be called upon to come forward, as if responding to a motion for summary judgment, with competent evidence supporting the facts upon which he would predicate liability";
- some sort of determination by the district court whether the plaintiff's evidence is indeed "competent";
- if it is, then some discovery for the employee defendant and the Government;
- "an evidentiary hearing at which both sides will tender their evidence on all disputes material to the scope of employment issue," which issue will coincide with the merits; and
- a resolution by the court (sitting without a jury) of "all issues of fact or law relevant to that issue."

Melo, 13 F.3d at 747; *accord Kimbro*, 30 F.3d at 1509.

Furthermore, given the Government's position that an "important aspect of [any] claim of absolute immunity" is "the right to take an immediate appeal if immunity is denied by the trial court," Haley Br. at 14-15, a court's finding that the plaintiff had indeed come forward with "competent evidence" to support liability would presumably trigger the right to an immediate appeal by the defendant employee. This notwithstanding the Court's ruling that even in a qualified immunity case, an order that "determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial," is *not* immediately appealable. *Johnson v. Jones*, 515 U.S. at 313.

Having emphasized that the federal removal statutes "do not require the officer virtually to 'win his case before he can have it removed,'" Haley Br. at 30, 46 (quoting *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 407)), it is ironic that the Government would propose a construction of the Westfall Act that would require the plaintiff virtually to win her case before she can have it tried. For the reasons set forth above and in

petitioner's opening brief, that construction is wrong, and the Attorney General lacks authority under the Act to issue an incident-denying certification.

III. Remand Is Compelled Where Removal Is Based on an Unauthorized Certification.

The second question presented is "[w]hether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification *was not authorized by the Act*." *Supra* p. i (emphasis added). Petitioner's opening brief showed that removal based on such an unauthorized certification is improper and obliges a remand under the terms of 28 U.S.C. § 1447(c), and that nothing in the Westfall Act overcomes this statutory obligation to remand. *See* Pet. Br. at 34-41.

1. Again, however, the Government's brief does not answer the question presented. Though advancing a solid argument against the remand of Westfall Act cases where the certification was *authorized*, *see* Haley Br. at 41-44, the Government shrugs off the actual question with the bare assertion that "the Attorney General's certification [in this case] was not a nullity," i.e., it was authorized by the Act, *id.* at 45. In effect, the Government has no answer to petitioner's showing that the remand of a case removed on the basis of an *unauthorized* certification is *compelled*.[4]

2. Given the Government's failure to challenge petitioner's statutory analysis with respect to remand, it is not strictly necessary to address the constitutional issue. Even so, we briefly address it in order to illuminate some points that may be obscured by the Government's argument.

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[4] In particular, the Government has no answer to petitioner's observation that the term "conclusively" found in the final sentence of § 2679(d)(2) cannot categorically foreclose remand in all circumstances, as the statute obviously does not authorize the Attorney General to remove *criminal* cases, cases commenced in a *tribal* court, or cases in which *trial had already begun*. *See* Pet. Br. at 38 n.13; *see also supra* pp. 3-4.

The Government contends that "giving conclusive effect to the Attorney General's certification is not contrary to Article III." Haley Br. at 45 (section heading). Petitioner continues to acknowledge that where a certification *properly* invokes the Act and *properly* removes the case to federal court, it is fairly said that the case " 'arises under' federal law, as that term is used in Art. III." *Lamagno*, 515 U.S. at 435 (plurality opinion) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). But where (as here and in other cases involving incident-denying certifications) the Act is not properly invoked, the case cannot be said to raise a "question of substantive federal law at the very outset." *Id.* (quoting same). In such cases, the federal court will certainly *not* engage in "substantive review of the Attorney General's scope certification and resolution of the availability of federal immunity." Haley Br. at 48. As we have explained, this is because an incident-denying certification does not truly raise the question of immunity.

To join the Government in drawing an analogy to the federal officer removal statute, *see* Haley Br. at 46-47, it is also fairly said that rejection of an incident-denying certification as unauthorized by the Westfall Act is akin to rejection of a federal officer's defense as not even "colorable." In that circumstance, as made clear in *Mesa v. California*, 489 U.S. 121 (1989), remand for lack of jurisdiction is compelled. To do otherwise —to retain the case in federal court merely because the defendant was a federal employee and the Attorney General had issued a piece of paper that did not (by definition) truly invoke a federal immunity defense —"would eliminate the substantive Art. III foundation of [the Westfall Act] and unnecessarily present grave constitutional problems." *Id.* at 137.

For these reasons, as well as the reasons set forth in petitioner's opening brief, a removal based on an incident-denying certification is improper and obliges a remand to state court under § 1447(c), and nothing in the Westfall Act overcomes that obligation.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits. In either event, the judgment of the district court remanding this action to the Trigg County (Kentucky) Circuit Court should be reinstated.

Respectfully submitted.

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